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No. 91-1854

Supreme Court, U
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In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM "RUSTY" WALLACE, III, AND
JACK IVEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in ruling as a matter of law that bobcats are covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Convention).

2. Whether a showing of general intent is sufficient to support a criminal conviction for violating the Endangered Species Act (ESA), 16 U.S.C. 1531-1544.

3. Whether the definition of "Convention" in the ESA as "the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto," encompasses amendments to the Convention's appendices.

4. Whether the Convention applies to the importation of specimens into the United States from a non-signatory nation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 949 F.2d 759.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1991. Petitions for rehearing were denied on February 14, 1992. Pet. App. 22a-23a. The petition for a writ of certiorari was filed on May 14, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner Wallace was convicted of conspiracy to receive bobcat hides knowing they had been imported illegally into the United States, in violation of 18 U.S.C. 371, and three counts of receiving bobcat hides knowing they had been imported illegally into the United States, in violation of 18 U.S.C. 545. Petitioner Ivey was convicted of conspiracy to receive bobcat hides knowing they had been imported illegally into the United States, in violation of 18 U.S.C. 371, and two counts of receiving bobcat hides knowing they had been imported illegally into the United States, in violation of 18 U.S.C. 545.

Petitioner Wallace was sentenced to five years' imprisonment, to be followed by a three-year period of supervised release, and was ordered to pay a $15,000 fine. Petitioner Ivey was sentenced to five years' imprisonment, to be followed by a three-year period of supervised release, and was ordered to pay a $5,000 fine. Gov't C.A. Br. 3. The court of appeals affirmed.

1. The United States is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Convention), Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, which regulates international trade in specimens of certain plant and animal species. See Pet. App. 24a-61a. The Convention classifies protected species into three groups that are subject to differing degrees of protection; the species that are members of each group are listed in separate appendices.

The Convention expressly provides for amendment of the appendices listing the various classes of protected species. Convention arts. XV, XVI, 27 U.S.T. 1110-1114; Pet. App. 50a-54a. When the Convention was signed in

1973, the only bobcat listed in the appendices was the *Felis lynx*. In November 1976, however, Appendix II was amended to include all species of cat not already included in other appendices, with the exception of the common house cat. 42 Fed. Reg. 10,469 (1977); 50 C.F.R. 23.23(f). Thus, the 1976 amendment added the common bobcat (*Felis rufus*) to Appendix II, and trade in bobcats then became subject to the conditions imposed on trade in any Appendix II species.

Congress implemented the Convention in the Endangered Species Act (ESA), 16 U.S.C. 1531-1544. See 16 U.S.C. 1531(a)(4)(F). The ESA provides that it is "unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention." 16 U.S.C. 1538(c)(1).

2. In 1986, the United States Fish and Wildlife Service received information that large numbers of bobcat hides were illegally entering the country from Mexico. In response, the Fish and Wildlife Service initiated an investigation to identify the individuals involved in the illegal fur trade and to interdict the flow of illegally imported hides. As part of the investigation, Fish and Wildlife agents opened a covert store-front operation named the "Van Horn Fur House." Pet. App. 2a.

The investigation revealed that petitioners were involved in trafficking in illegally smuggled furs, including numerous bobcat hides. Pet. App. 2a. On December 22, 1986, government agents purchased bobcat hides and other furs from Flavio Estrada, a known dealer in Mexican furs. The agents then arranged a meeting with petitioners. *Id.* at 3a.

At the meeting, petitioner Wallace stated that he had seen some of the hides at Estrada's house. Pet. App. 3a. After one of the agents indicated that some of the hides

were from Mexico, Wallace stated, "If someone tells me the furs are from Mexico, I don't buy them," and "If you tell me these furs are from Mexico, I am going to walk." *Id.* at 3a-4a.

On January 15, 1987, petitioners arrived at the Van Horn Fur House, and helped the agents unload furs contained in white sacks with Spanish writing on them. Petitioner Wallace asked whether the furs were from Mexico, and the agents responded that they were. Petitioner Wallace then told the agents that he was leaving, and observed, "If I would have known you better, if I had gone to high school with you, maybe we would be doing business right now." Petitioner Ivey stated that the "words" the agents used were wrong and that if they used the right "words" they could do business in the future. Pet. App. 4a.

Thereafter, on February 4, 1987, petitioners returned to the Fur House to purchase bobcat hides. Petitioners asked the agents to sign a waiver certifying that the bobcats were legally taken. One of the agents signed the waiver, commenting, "You all were good teachers the last time, we are good learners. If that is what it takes, I will sign it." Pet. App. 4a.

3. On June 28, 1990, petitioners were charged in a seven-count superseding indictment with conspiracy to receive and receipt of bobcat hides imported illegally into the United States. Petitioners moved to dismiss the indictment, but the district court denied the motion.

At trial, the district court instructed the jury that "importation of bobcat hides into the United States from the Republic of Mexico without proper permits is contrary to law." 5 Tr. 223; see Pet. App. 11a. In addition, the jury was instructed not to convict petitioners unless it found, *inter alia*, that petitioners knew that the bobcat hides had been imported illegally into the United States. 5 Tr. 220, 222-223.

4. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-21a. The court held that the ESA's incorporation of the Convention was meant to encompass subsequent amendments to the Convention, reasoning that the contrary interpretation would undermine the purposes of the ESA and that the Convention as originally adopted provided for amendments to the appendices. Pet. App. 6a-8a. The court also held that the Convention was applicable to this case even though Mexico, the country of origin of the bobcat hides, is not a party to the Convention. *Id.* at 8a-9a. The court explained that "[r]egardless of whether the Convention encompasses non-signatories, the Convention applies to trade within a signatory's jurisdiction," and that "United States law requires persons subject to its jurisdiction to obtain proper export permits from the country of origin establishing that the species was lawfully taken." *Id.* at 8a-9a.

The court also rejected petitioners' claim that 16 U.S.C. 1538(c) is violated only where defendants act with specific intent to violate known legal duties. Relying on the legislative history and general regulatory purpose of the ESA, the court concluded that the statute requires only general criminal intent. Pet. App. 11a-13a.

ARGUMENT

1. Petitioners contend (Pet. 4-6) that the district court erred in depriving the jury of the opportunity to decide whether bobcats are listed in Appendix II of the Convention and, if so, whether the animals involved in this case were bobcats within the meaning of the Appendix II listing. That contention lacks merit.

The district court correctly ruled as a matter of law that bobcats are listed in Appendix II of the Convention. Since 1977, Appendix II and the federal regulations implementing the Convention have listed all species of cat

other than the common house cat. 42 Fed. Reg. 10,469 (1977); 50 C.F.R. 23.23. The determination of the scope and coverage of federal law is, of course, quintessentially a question of law to be decided by the court.

United States v. *Doyle*, 786 F.2d 1440 (9th Cir.), cert. denied, 479 U.S. 984 (1986), on which petitioners rely (Pet. 5-6), is not to the contrary. In *Doyle*, the defendant was charged with illegally trading in falcons, in violation of the ESA. The court began its analysis by noting that "[i]t is undisputed that an anatum peregrine falcon is * * * an endangered species" within the meaning of the ESA, citing the applicable regulations. 786 F.2d at 1444. The court went on to find, however, that the government had failed to meet its burden of proving "beyond a reasonable doubt that the falcons which Doyle transported were anatum peregrine falcons." *Ibid.* Thus, *Doyle* stands only for the proposition that the government must prove that the particular animals received or transported by the defendants were in fact specimens of a species subject to the protections of the ESA; *Doyle* provides no support for the contention that the jury must be permitted to determine whether a particular species as a whole is protected by the ESA.

The decision below is entirely consistent with *Doyle*. Contrary to petitioners' contention, the district court did not take from the jury the question whether the hides received by petitioners were in fact specimens of a species—the common bobcat—that is listed in Appendix II of the Convention. Instead, the district court clearly instructed the jury that it could not convict petitioners unless it first found that they "knowingly received and concealed bobcat hides." 5 Tr. 222, 223.[1] Thus, the

[1] Moreover, the court of appeals concluded that there was sufficient evidence at trial to support the jury's finding that the particular hides in question were bobcat hides. Pet. App. 15a-16a.

district court properly left to the jury the factual question whether petitioners received bobcat hides, while reserving to itself the legal question of the precise meaning and scope of the Convention and the ESA. Petitioners' claim does not warrant further review.

2. Petitioners also argue (Pet. 9-10) that specific intent is required for a criminal conviction under 16 U.S.C. 1538(c), the provision of the ESA that makes it unlawful to engage in trade in violation of the Convention. But petitioners were not charged with or convicted of violating 16 U.S.C. 1538(c).[2] Instead, they were convicted of conspiring to violate 18 U.S.C. 545 and of violating 18 U.S.C. 545 by knowingly receiving bobcat hides that had been illegally imported into the United States. Gov't C.A. Br. 2. Thus, petitioners' claim is beside the point. The proper question is the *mens rea* required for conviction under 18 U.S.C. 545, a question not presented in the petition.

In any event, petitioners' claim would lack merit even if it were properly presented. The district court instructed the jury not to convict unless petitioners *knew* that the bobcat pelts had been imported in violation of law. 5 Tr. 220, 222-223.[3] Thus, petitioners' concern

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[2] Strictly speaking, 16 U.S.C. 1538(c) does not establish a criminal offense at all. Section 1538(c) states merely that "[i]t is unlawful" to engage in trade contrary to the provisions of the Convention. Violation of Section 1538(c)(1) is made a criminal offense by virtue of 16 U.S.C. 1540(b)(1), but petitioners were not charged under that provision, which in any event creates a *general* intent crime. See *United States* v. *Nguyen*, 916 F.2d 1016, 1018-1019 (5th Cir. 1990); *United States* v. *St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *United States* v. *Billie*, 667 F. Supp. 1485, 1492-1493 (S.D. Fla. 1987).

[3] With respect to the conspiracy count, the district court instructed the jury that the government was required to prove that petitioners "knowingly receive[d] and conceal[ed] merchandise that was unlawfully imported into the United States *and which they*

(Pet. 10) that "[n]o useful end is served by prosecuting the 'violators' when they have no knowledge of the law's provision" is simply not implicated here, because the jury found beyond a reasonable doubt that petitioners did in fact know that the law had been violated.

3. Petitioners assert (Pet. 6-7) that the ESA's incorporation of the Convention in Section 1538(c)(1) is limited to the version of the Convention and its appendices that existed on March 3, 1973. Petitioners rely on the Act's definition of the term "Convention" as "the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto." 16 U.S.C. 1532(4).

Petitioners' argument is inconsistent with the plain language of the statute. By normal principles of grammar, the phrase "signed on March 3, 1973," modifies the phrase "Convention on International Trade in Endangered Species of Wild Fauna and Flora," and not the phrase "appendices thereto." Thus, nothing in the text of the ESA limits the incorporation of the appendices to the form in which they existed in 1973.

Moreover, the Convention expressly provides for regular amendments to the appendices to add or remove species as conditions change. Convention arts. XV-XVI, 27 U.S.T. 1110-1114; Pet. App. 50a-54a. Petitioners' interpretation would read those provisions out of the Convention, and would frustrate the goals of the

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knew to be unlawfully imported into the United States." 5 Tr. 220 (emphasis added). The court included a similar instruction for each of the substantive counts. 5 Tr. 222 (petitioner Wallace "knew that the merchandise imported or brought into the United States was brought in contrary to law"); *id.* at 223 (petitioners "knowingly received and concealed bobcat hides * * * knowing said merchandise to have been imported or brought into the United States contrary to law"); *ibid.* (incorporating elements of previous count by reference).

Convention and the ESA. Pet. App. 7a. Accordingly, the court of appeals correctly rejected petitioners' interpretation of the Act.[4] Further review is not warranted.

4. Petitioners clearly err in contending (Pet. 8-9) that the importation of restricted species from Mexico is not prohibited by the Convention because Mexico is not a party to the Convention. The Convention expressly provides that "[t]he import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate." Convention art. IV(4), 27 U.S.T. 1096; Pet. App. 34a; see also 50 C.F.R. 23.12(a)(2)(i). The Convention recognizes that non-signatory nations may not provide documentation in the form specified by the Convention, and accordingly states that "comparable documentation * * * which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party." Convention art. X, 27 U.S.T. 1104; Pet. App. 43a-44a; see also 50 C.F.R. 23.14. Thus, regardless of a listed specimen's country of origin, the Convention forbids the importation of the specimen into the United States without appropriate documentation.

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[4] The decision below is also in accord with those decisions holding in similar contexts that the applicable law is the law which exists at the time of the offense, not the law which existed at some previous time. See, *e.g.*, *United States v. Francisco*, 536 F.2d 1293, 1295-1298 (9th Cir.), cert. denied, 429 U.S. 942 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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